

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LIBERTY MUTUAL INSURANCE)	
COMPANY,)	
)	
Plaintiff)	
)	
v.)	Civil No. 91-383-P-H
)	
HAROLD J. BROWN, JR.,)	
)	
Defendant)	
)	
and)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT OF)	
LABOR,)	
Intervenor)	

**RECOMMENDED DECISION ON MOTIONS BY DEFENDANT AND INTERVENOR
TO
DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1)**

In this case, brought pursuant to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. ' ' 901-50 (``LHWCA" or ``Act"), and 28 U.S.C. ' 1331, the plaintiff, a Bath Iron Works Corporation (``BIW") workers' compensation insurer, seeks to recover from the defendant disability payments that were made to him under the Act and subsequently determined not to be owing by it. Before the court at this time is the defendant's and intervenor's¹ motions to dismiss for lack of subject-matter jurisdiction.

¹ The intervenor, the director of the Office of Workers' Compensation Programs of the United States Department of Labor, is responsible for administering the LHWCA.

I. BACKGROUND

Background facts are not in dispute and may be briefly summarized.² The defendant, Harold J. Brown, Jr., worked for BIW as a shipfitter at its Bath shipyard from 1941 until April 1978 at which time he was transferred to BIW's Hardings facility where he worked until his voluntary retirement on June 1, 1984. In July 1983 he filed a claim for compensation benefits under the LHWCA with the United States Department of Labor, Office of Workers' Compensation Programs, alleging gradual noise-induced hearing loss in both ears.

² At a recently held final pretrial conference the parties stipulated to a number of facts. *See* Report of Final Pretrial Conference and Order ("Report") & 2.

On August 5, 1983 BIW and the plaintiff, which provided BIW's workers' compensation insurance coverage from March 1981 to and including the time of the defendant's claim, filed a notice controverting the claim on the basis of insufficient medical evidence relating the injury and disability to employment and subsequently filed an answer to the claim asserting that the plaintiff was not the carrier providing workers' compensation coverage as of the date of the last injurious exposure. In June 1986 an administrative law judge ruled that the defendant was entitled to benefits and that the plaintiff was the carrier responsible for paying those benefits. BIW and the plaintiff filed a notice of appeal in July 1986 with the Benefits Review Board ("BRB") followed by a petition for review assigning error in the administrative law judge's findings that BIW's Hardings facility is a covered situs within the jurisdictional coverage of the LHWCA³ and that the plaintiff is the responsible carrier and in his award of benefits to the defendant. Pending appeal, the plaintiff paid the defendant the awarded benefits as is required by the LHWCA in order to avoid a 20-percent penalty in the absence of a stay order.⁴

In July 1989 the BRB reversed the administrative law judge's decision insofar as it found the Hardings facility a "covered situs" and the plaintiff the responsible carrier, ruled that Commercial Union Insurance Companies ("Commercial Union") is the carrier responsible for the defendant's

³ The Act covers disability or death resulting from injuries occurring upon the "navigable waters of the United States," defined as including any "adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. ' 903(a). Thus, the "covered situs" issue raised on appeal is whether the Hardings facility is an adjoining area within the meaning of the LHWCA.

⁴ The Act requires prompt payment of compensation unless the right thereto is controverted, 33 U.S.C. ' 914(a), and imposes an automatic 20-percent penalty upon the failure to pay awarded compensation within 10 days after it becomes due unless review is sought and an order staying payment has been issued, *id.* ' 914(f). The BRB and a court of appeals reviewing a final Board order may stay payments required by an award upon a showing of irreparable injury to the employer or carrier. *Id.* ' 921(b)(3), (c); *see also* 20 C.F.R. ' 802.105. A beneficiary of a compensation award that has become final may apply to the district court for its enforcement in circumstances where an employer or its agents fail to comply. 33 U.S.C. ' 921(d).

employment-related hearing loss during the period 1941 through 1978,⁵ vacated the benefits award and remanded the case for the administrative law judge to determine the extent of the defendant's work-related hearing loss from 1941 until he was transferred to the Hardings facility.

In February 1990 another administrative law judge, acting on remand, denied benefits altogether finding that the defendant was exposed to excessive noise after he transferred to Hardings and that he failed to prove that he sustained any hearing loss while working at the shipyard from 1941 to 1978. In July 1990 the defendant petitioned the BRB to review and set aside this new decision and order. The BRB did just that in June 1992, some 6 months after this lawsuit was initiated, ruling that the evidence indicates that the defendant is entitled to compensation for a partial hearing impairment related to the period of his employment at the shipyard and that Commercial Union is the responsible carrier. Now pending before the BRB is BIW's and Commercial Union's motion for reconsideration of its latest decision and order.

⁵ The BRB's opinion notes that the plaintiff came on the risk on March 1, 1981, after the defendant had transferred to the Hardings facility, and that Commercial Union stipulated that it was on the risk from January 1, 1963 until January 28, 1981 and was therefore at risk when the defendant was transferred in 1979.

The record does not indicate that the plaintiff at any time sought a stay of payments,⁶ an order from the BRB directing reimbursement of the payments made⁷ or review in the court of appeals of the BRB's failure to order reimbursement.⁸

II. LEGAL ANALYSIS

In count I of the complaint the plaintiff states that it seeks reimbursement and recovery of all payments made to the defendant "[u]nder federal common-law principles of unjust enrichment in connection with applying the . . . Act." Complaint ¶ 24. The burden of proving jurisdiction is on the plaintiff. *See* 5A C. Wright & A. Miller, *Federal Practice and Procedure* ¶ 1350 at 194 n.2 (1990) (C. Wright & Miller"). Because jurisdiction is based on a federal question, the plaintiff must show that it has asserted a claim under federal law and that the claim is not frivolous. *Id.* at 226-27.

⁶ *See supra* n.4.

⁷ *See* 33 U.S.C. § 921(a)-(b); 20 C.F.R. § 802.211(a).

⁸ *See* 33 U.S.C. § 921(c). During the final pretrial conference the plaintiff's counsel confirmed that the plaintiff never pursued any of these forms of relief.

It is axiomatic that federal courts have limited jurisdiction. Jurisdiction exists in this case only if the LHWCA provides an insurer a right to recover compensation payments made pursuant to an administrative order in circumstances where the insurer is later determined not to be responsible for those payments and that right may be asserted directly in the district court, or the plaintiff's claim of unjust enrichment may be pursued under the general federal-question statute, 28 U.S.C. ' 1331.⁹

The Act is not unlike most state workers' compensation statutes in that it ``represents a compromise between the interests of injured workers, who receive a certain and immediate recovery, and the interests of employers and insurers, who in turn receive `definite and lower limits on potential liability than would have been applicable in common-law tort actions for damages.'" *In re Claim for Compensation Under the Longshore & Harbor Workers' Compensation Act*, 889 F.2d 626, 632 (5th Cir. 1989) (quoting *Potomac Elec. Power Co. v. Director, Office of Workers' Comp. Programs*, 449 U.S. 268, 281-82 (1980)), *cert. denied*, 494 U.S. 1082 (1990). Thus, the liability of an employer under the LHWCA is ``exclusive and in place of all other liability of such employer to the employee" 33 U.S.C. ' 905(a). Where an employer's obligations under the Act are secured through insurance, *see* 33 U.S.C. ' 932(a), the carrier is effectively substituted for the employer as the party responsible for discharging the employer's liability for compensation, *see id.* ' 935.

Only three provisions of the Act speak directly to the issue of reimbursement of payments made. Section 914(j) provides for reimbursement of advance payments only out of unpaid installments of compensation due. Section 908(j) makes clear that forfeited compensation already paid may be recovered only from compensation payable. And section 922 provides for recovery of overpayments resulting from modification of an award only out of unpaid compensation. No

⁹ Section 1331 provides that ``[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."

provision of the LHWCA expressly permits an employer to recover overpayments directly from an employee.

The statutory scheme provides for review of compensation orders by the BRB and courts of appeals. 33 U.S.C. ' 921(b), (c). The role of the district courts under the Act is limited. They have specifically authorized jurisdiction to enforce final administrative orders awarding workers' compensation, *see supra* n.4, to enter judgment on a supplementary administrative order declaring an amount of default by an employer in the payment of compensation due under an award, *see id.* ' 918(a), and to punish as contempt of court any disobedience during an administrative hearing or resistance to a lawful administrative order or process, *see id.* ' 927(b). Of critical importance is section 921(e) which provides that "[p]roceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this title."¹⁰ *Id.* at ' 921(e). Clearly, then, the LHWCA does not expressly allow for the kind of direct action brought here.

Nor, as the only two circuit courts to address the jurisdiction issue in similar circumstances have held, does the Act confer on an employer, and derivatively on an insurer, an implied right of action to recover in a district court suit against a claimant payments made which are subsequently determined not to be owing. *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1207 (5th Cir. 1992); *Stevedoring Serv. of Am., Inc. v. Eggert*, 953 F.2d 552, 557 (9th Cir.), *cert. denied*, 112 S. Ct. 3056 (1992). This is so because, by expressly providing only for restricted recovery of payments made in defined

¹⁰ Before the LHWCA was amended in 1972, the district courts were empowered to review compensation orders directly. The 1972 amendments created the BRB to hear all direct appeals of compensation orders in place of the district courts. *In re Claim*, 889 F.2d at 629.

circumstances, Congress has made clear its intent to limit the right of recovery. *See* 33 U.S.C. ' ' 908(j), 914, 922.

The question remains whether the court has jurisdiction of the plaintiff's unjust-enrichment claim as one arising under the federal common law. This issue, too, was squarely addressed by the Fifth Circuit in *Ceres Gulf*. The plaintiff in that case, a stevedoring company, brought an original action in district court against a former employee to recover advance payments made under the LHWCA. In addition to contending that an implied cause of action existed under the Act to recover such payments, it also maintained that its action arose under the federal common law of fraud and unjust enrichment. The court concluded that general section 1331 jurisdiction is unavailable ``where, as here, Congress has created a specific, statutorily-defined scheme that clearly supplants the general jurisdictional statute." *Ceres Gulf*, 957 F.2d at 1208. I agree. By adopting the LHWCA, ``Congress has provided a detailed scheme for presentation, payment, adjudication and review of claims covered by the LHWCA," *id.*, and has thereby preempted any general federal-question jurisdiction that might otherwise exist. *See also Whitney Nat'l Bank in Jefferson Parish v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 419-22 (1965) (when Congress designates a forum for judicial review of administrative action, that forum is exclusive); *Louisville & Nat'l R.R. v. Donovan*, 713 F.2d 1243, 1245-46 (6th Cir. 1983) (district court lacked section 1331 jurisdiction because under Black Lung Benefits Act, 30 U.S.C. ' ' 901-62 (``BLBA"), Congress has specifically provided statutory scheme for administrative

claims adjudication and review in courts of appeals with limited jurisdiction in district courts), *cert. denied*, 466 U.S. 936 (1984).¹¹

¹¹ BLBA decisions are instructive in that much of the statutory scheme for both administrative and judicial review of benefits determined thereunder is borrowed from the LHWCA. *See Krolick Contracting Corp. v. Benefits Review Bd.*, 558 F.2d 685, 686-88 (3d Cir. 1977) (describing relationship between BLBA and LHWCA); *Compensation Dep't of Dist. Five, United Mine Workers of Am. v. Marshall*, 667 F.2d 336, 338 n.2 (3d Cir. 1981) ("Much of the statutory scheme for both administrative and judicial review of benefits determinations under the BLBA is borrowed from the [LHWCA].").

The plaintiff seeks to distinguish this case from all present authority by arguing that the BRB ruled that the administrative law judge who first awarded benefits to the defendant had no jurisdiction over the defendant's claims against it and that, therefore, there was no jurisdiction under the LHWCA to order that payments be made to the defendant. Plaintiff's Memorandum of Law at 1 (Docket No. 18). This is an incorrect statement of the Board's ruling and its effect. The BRB determined in its first decision, not yet final,¹² that the Hardings facility was not a covered situs and that the defendant's entitlement to benefits under the Act turned on whether he developed a work-related hearing impairment during the period of his employment at BIW's shipyard before transferring to Hardings. The Board ruled that, regardless of whether the defendant is ultimately determined to be entitled to benefits, the plaintiff is not the responsible carrier by virtue of the fact it came on the risk only after the defendant transferred to the Hardings facility. Nowhere does the Board suggest -- nor could it -- that the Office of Workers' Compensation Programs of the U.S. Department of Labor was without jurisdiction under the LHWCA to consider the defendant's workers' compensation claims against his employer, BIW. Indeed, where, as here, both an employer and an employee are acknowledged to be subject to the Act, *see* Plaintiff's Answer to Claim for Compensation, Exh. vii to Plaintiff's Pretrial Memorandum (Docket No. 27), and an employee asserts a claim for compensation under it, coverage issues respecting the claim are among those determined within the Act's framework.

¹² As noted earlier, the matter is presently before the BRB on BIW's and Commercial Union's motion for reconsideration of its June 1992 decision and order awarding the defendant compensation for a partial hearing loss. Once the Board acts finally, any aggrieved parties will be entitled to a review of the Board's orders, including its decision respecting the status of the Hardings facility, in the Court of Appeals for the First Circuit. *See* 33 U.S.C. ' 921(c).

The plaintiff also argues that a construction of the LHWCA which permits the defendant to retain the payments received from it raises a constitutional due process issue. Plaintiff's Memorandum of Law at 6-7. Of course, this court may not address this issue in any context unless it has subject-matter jurisdiction of the plaintiff's federal-question claims which, for the reasons noted above, I conclude it does not. In any event, the administrative decisions underlying the plaintiff's claims are not yet final. Further, the plaintiff seeks by this lawsuit to accomplish what it has not even sought to accomplish within the administrative process inasmuch as it has at no time asked for a stay of payments or an order from the BRB directing reimbursement of the payments made.

Remaining for consideration is the plaintiff's pendent state-law unjust-enrichment claim. When federal claims are dismissed the court has the discretion to dismiss pendent state-law claims against the same defendant. *See Mladen v. Gunty*, 655 F. Supp. 455, 460-61 (D. Me. 1987); 13B C. Wright, A. Miller & E. Cooper ' 3567.1 at 133-137 (1984). In this case I can discern no compelling reason why this court should retain jurisdiction and decide the remaining state-law issue. Accordingly, I conclude that the state-law claim should also be dismissed.

III. CONCLUSION

For the foregoing reasons, I recommend that the motions of the defendant and intervenor to dismiss the entire action for lack of subject-matter jurisdiction be *GRANTED*.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 23rd day of September, 1992.

David M. Cohen
United States Magistrate Judge